

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs April 1, 2008

**IN THE MATTER OF M.B.**

**Appeal from the Juvenile Court for Robertson County**  
**No. D25963     Melanie E. Stark, Special Judge**

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**No. M2007-02755-COA-R3-PT - Filed May 29, 2008**

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The trial court terminated the parental rights of the father of a three-year old boy on the ground of his conviction for aggravated robbery and sentence of sixteen years in prison. *See* Tenn. Code Ann. § 36-1-113(g)(6). The father argues on appeal that the crime he committed was a direct result of the failure of the Department of Children's Services to make reasonable efforts to reunite him with his child and, thus, that his rights should not have been terminated. We affirm the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed**

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Jarod C. Richert, Springfield, Tennessee, for the appellant, B. S.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth C. Driver, Assistant Attorney General, for the appellee, State of Tennessee, Department of Children's Services.

Marisa Lee Combs, Springfield, Tennessee, for the appellee, Guardian Ad Litem.

**OPINION**

**I. PRIOR TERMINATION PROCEEDINGS**

We note at the outset that this is the second time that a termination proceeding involving these parties has come before this court. The following brief summary of the events surrounding the first termination proceeding is largely derived from the opinion generated from that proceeding, *In re M.B.*, No. M2006-02063-COA-R3-PT, 2007 WL 1034676 (Tenn. Ct. App. March 30, 2007) (no Tenn. R. App. P. 11 application filed).

The child at the center of this dispute, M.B., was born on April 27, 2004. The child's father, B. S. ("Father"), was an admitted drug abuser with an extensive criminal record. He was in jail at the time of the child's birth, but was released shortly thereafter. M.B. lived with his mother and father in a motel and was cared for by them until he was four months old, when both parents were arrested for drug offenses.

The Department of Children's Services ("DCS" or "the Department") then took M.B. into protective custody and placed him with a foster family.<sup>1</sup> The Department subsequently filed a dependency and neglect petition, alleging among other things that the parents had smoked crack cocaine in the presence of M.B. and that there were no other relatives available to care for him. The court appointed a guardian ad litem to represent the interests of the child and granted the Department's petition.

DCS developed a permanency plan with the stated goal of reuniting M.B. with his parents. Among other things, the plan required that Father become drug-free, that he refrain from violating the law, and that he establish a stable home and employment with income sufficient to support his child. DCS then assigned implementation of the parenting plan to Residential Services, Inc. ("RSI"), a private social services agency, which worked to get Father admitted into a drug rehabilitation program.

Father successfully completed the thirty day inpatient program in January, 2005, but subsequently found himself unemployed and homeless.<sup>2</sup> RSI did not help him find work or housing, allegedly because he left town after completing drug treatment, and they were unable to contact him. In May of 2005, Father was arrested for aggravated burglary and theft of property, and he went to jail.

On March 10, 2006, the Department filed a petition to terminate the parental rights of both Father and Mother, citing numerous grounds, including abandonment, failure to provide a suitable home, and persistence of conditions. After a hearing on the petition, the trial court terminated the parental rights of both parents. Mother did not appeal the trial court's decision, but father appealed to this court.

After examining the record and the briefs of the parties, we found that the Department did not prove that it had performed its statutory duty to make reasonable efforts to reunite the family, as is required by Tenn. Code Ann. § 37-1-166. We accordingly vacated the termination order and remanded the case to the trial court to give the Department the opportunity to present additional evidence as to its efforts (or those of its surrogate, RSI) to contact and assist the parents.

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<sup>1</sup>The child's half-sister was also removed at the same. Father is not that child's father, so there is no question of termination of parental rights involving her in this proceeding.

<sup>2</sup>The proof presented at trial suggests that Father was living with a Mrs. Hill after completing the drug program and that he had found a night shift warehouse job.

## II. CURRENT PROCEEDINGS

On March 21, 2007, Father pled guilty to a charge of aggravated robbery arising from his May 2005 offense, and he was sentenced to sixteen years in prison as a Range II multiple offender. On July 26, 2007, the Department filed a new petition to terminate Father's parental rights, which cited only one of the statutory grounds for termination, namely that

The parent has been confined in a correctional or detention facility of any type, by order of the court as a result of a criminal act, under a sentence of ten (10) or more years, and the child is under eight (8) years of age at the time the sentence is entered by the court.

Tenn. Code Ann. § 36-1-113(g)(6)

DCS also contended that it was in M.B.'s best interest that Father's parental rights be terminated, citing the lack of a meaningful relationship between Father and M.B., the existence of a strong bond between the child and his foster parents, Father's failure to pay child support, and his continued incarceration.

The hearing on the petition was conducted on November 7, 2007. Father was represented by appointed counsel, and the guardian ad litem represented the interests of M.B. Father's counsel stipulated at the outset to the ground alleged, but argued that while the statute permitted termination of parental rights on such a ground, it did not require the court to terminate the parent's right.

Father was released from prison for the purpose of appearing at the hearing, and he testified at length. He was questioned about the circumstances behind the robbery for which he was sentenced. He testified that he was desperate after he completed the drug program because he had no job or a permanent place to stay and he was afraid of losing his son. He said, "I wasn't thinking clearly when I done what I done."

He also acknowledged that he had prior convictions for strong-arm robbery, for theft, and for perjury, but claimed that he didn't know exactly how many felony convictions he had. The proof showed that the forty-eight year old Father had first gotten into trouble with the law when he was nineteen and that he had a long history of drug abuse. He admitted that he had made a lot of mistakes, but claimed that he had finally learned from those mistakes. He also testified that he had a parole hearing scheduled in the next four to six months, and that if he was released he would try to do better for the sake of his child.

Father was asked how many times he had contacted DCS or had tried to contact M.B. since completing his drug program, and he responded "I'm guessing 40 to 50 times at least." He also testified that he never attempted to directly contact M.B. because he assumed he was not supposed to have contact with the foster mother. He was asked why he did not sent any mail to DCS to be forwarded to his son, and he responded, "from my experience I just didn't trust them."

Other witnesses to testify were the DCS case manager for M.B., a case worker from RSI, and M.B.'s foster mother. The DCS case manager testified that she had received eight or nine phone calls from Father since he was incarcerated and that Father had asked for pictures of M.B. and for reports on his progress. She also testified that Father had never sent any letters, cards or gifts to the child.

The witness from RSI testified that she worked with the therapeutic visitation program, that she had been able to arrange and supervise only one visit between Father and M.B. after he completed the drug program, and that the interaction between parent and child was "fine" during that visit. She also testified that other visits were scheduled, but that a friend of Father called and left a message to let her know that he couldn't come because he was working a third-shift job. Father never called to reschedule those visits, and although RSI tried to get in touch with him, its attempts were unsuccessful, so they eventually closed the case.

The foster mother testified that she lived with her fiancé, her fiancé's two daughters, and her own daughter and that she had been taking care of M.B. since he was seven months old. She stated that she loves M.B., and she described a typical day with the child that ended at bedtime with him declaring that he loves her. She said that she considered herself to be M.B.'s mother, and that she wanted to adopt him. She also testified as to M.B.'s special needs.

The child was born with hydrocephalus, and he lacked a corpus callosum, which is a normal part of brain structure. Apparently the lack of such a structure can be a cause of developmental delay. M.B. was three-and-a-half years old at the time of trial. He wears glasses because of very poor vision, and he also wears orthopedic shoes. The foster mother takes him to see a neurologist and a speech therapist on a regular basis, and helps him daily with puzzles that are recommended for developmental progress.

At the conclusion of proof, the attorney for DCS gave a closing argument, and the court granted Father's request to give his own closing argument. Father delivered an impassioned statement in which he bitterly criticized DCS for its failure to help him when he needed that help and for its arrogant attitude towards him. He complained that "if they'd done their job, it might have come out a little bit different." He also declared that he loved M.B. and wanted to remain in his life, that it was important for a child to know his own father, that he wasn't too old to change, and that once he was out of prison he would do the right thing for M.B.

After a brief recess, the trial court announced its ruling from the bench. The court first found that a valid ground for termination had been proven by clear and convincing evidence, namely Father's sentence of ten or more years. The court then went on to discuss the best interest of the child, including the factors set out in Tenn. Code Ann. § 36-1-113. In light of those factors, including the lack of a meaningful relationship between Father and child, the bonding between M.B. and his foster mother, Father's criminal history and his lengthy sentence, the court concluded that it was in M.B.'s best interest for Father's parental rights to be terminated, and that "[t]his Court cannot wait for this child's father to get his life in order." The court's ruling was memorialized in an order filed

on November 21, 2007. This appeal followed.

### III. STANDARDS FOR PARENTAL TERMINATION

Parents have a fundamental right to the care, custody, and control of their children. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *In re Adoption of A.M.H.*, 215 S.W.3d 793, 809 (Tenn. 2007), *cert. den.*, 168 L.Ed.2d 729 (2007). However, that right is not absolute and may be terminated in certain circumstances. *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982); *State Dep't of Children's Services v. C.H.K.*, 154 S.W.3d 586, 589 (Tenn. Ct. App. 2004).

Terminating parental rights has the legal effect of reducing the parent to the role of a complete stranger and of severing forever all legal rights and obligations of the parent and of the child; and the parent shall have no right thereafter to have any relationship, legal or otherwise, with the child. Tenn. Code Ann. § 36-1-113(l)(1). The United States Supreme Court has recognized the unique nature of proceedings to terminate parental rights, stating that “[f]ew consequences of judicial action are so grave as the severance of natural family ties.” *M.L.B. v. S.L.J.*, 519 U.S. 102, 119, (1996) (quoting *Santosky*, 455 U.S. at 787, (Rehnquist, J., dissenting)).

The statutes on termination of parental rights provide the only authority for a court to terminate a parent’s rights. *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004); *In re Tiffany B.*, 228 S.W.3d 148, 155 (Tenn. Ct. App. 2007). Thus, parental rights may be terminated only where a statutorily defined ground exists. Tenn. Code Ann. § 36-1-113(c)(1); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002); *In re M.W.A.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). To support the termination of parental rights, only one ground need be proved, so long as it is proved by clear and convincing evidence. *In the Matter of D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003).

Because the decision to terminate parental rights affects fundamental constitutional rights and carries grave consequences, courts must apply a higher standard of proof when adjudicating termination cases. A court may terminate a person’s parental rights only if (1) the existence of at least one statutory ground is proved by clear and convincing evidence and (2) it is shown, also by clear and convincing evidence, that termination of the parent’s rights is in the best interest of the child. Tenn. Code Ann. § 36-1-113(c); *In re Adoption of A.M.H.*, 215 S.W.3d at 808-09; *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). “This heightened standard . . . serves to prevent the unwarranted termination or interference with the biological parents’ rights to their children.” *In re M.W.A.*, 980 S.W.2d at 622.

#### IV. GROUNDS

The final order in the present case cited only one statutory ground for termination: that Father was confined in prison under a sentence of ten or more years incarceration, and that his child was under the age of eight when the sentence was rendered. *See* Tenn. Code Ann. § 36-1-113(g)(6). Father testified as to his sentence and incarceration, and his attorney stipulated to that ground. Also, an authenticated judgment form from the Criminal Court of Davidson County documenting Father's conviction and sentence was admitted into the record. Thus, it is beyond dispute that a ground for termination was proved by the clear and convincing evidence standard. As we noted above, only one ground need be established, so long as it is proved by clear and convincing evidence.

Father attempts to minimize the significance of that ground by arguing that with a parole hearing coming up, he may be released soon. He testified that he didn't think M.B. should have to remain in limbo, but "I'm not going to be locked up forever." However, parole eligibility does not equate with release, but only with the possibility of release. Further, the legislature was aware of the law of parole when it enacted Tenn. Code Ann. § 36-1-113(g)(6). *See Washington v. Robertson County*, 29 S.W.3d 466, 473 (Tenn. 2000) ("the legislature is presumed to know of its prior enactments and the state of the law when it enacts legislation."). *See also Riggs v. Burson*, 941 S.W.2d 44, 54 (Tenn. 1997); *Wilson v. Johnson County*, 879 S.W.2d 807, 810 (Tenn. 1994). The legislature provided no exception for parole when it decided that the imposition of a ten-year sentence constituted an independent ground for termination of parental rights. We therefore do not believe that the possibility of early parole constitutes a sufficient basis to negate the statutorily-defined ground.

Father also claims that if he had known that his sentence would have led to the loss of his parental rights, he would never have agreed to the plea bargain that resulted in that sentence. He cites the cases of *Boykin v. Alabama*, 395 U.S. 238 (1969), *State v. Pettus*, 986 S.W.2d 540 (Tenn. 1992), and *State v. Mackey*, 553 S.W.2d 337 (Tenn. 1977) for the proposition that before a court may accept a guilty plea, it must ensure that the plea is voluntary, meaning among other things that the accused has a full understanding of what the plea connotes and of its significant consequences. He contends that since loss of parental rights is a significant consequence of the sentence he agreed to, and since he was never informed of that consequence, the trial court should not have used that sentence as the sole ground for terminating his fundamental parental rights.

That argument misses the mark in several respects. The record indicates that Father was represented by appointed counsel at the first termination hearing (which was conducted after he was arrested but before he was sentenced) and that he was represented by a public defender in the criminal proceedings against him. Thus, he could have asked his counsel at either proceeding what effect his sentence might have on his parental rights. Further, if he had not taken the plea offered, there was no guarantee that he would have ultimately wound up with a shorter sentence, but there was a possibility that he would have received an even longer one. Finally, the question of whether a plea to a criminal offense is voluntary may be taken up by the Court of Criminal Appeals, but it is not a matter that falls within the authority of the Court of Appeals.

Father also argues that the failure of DCS to make reasonable efforts to help him with housing and a job put him in a desperate state of mind, which led him to commit the crime for which he was sentenced. He urges us to apply the doctrine of proximate cause, which is normally part of the law of negligence, and to accordingly find that his crime was the “natural and probable consequence of the Department’s wrongdoing.” He argues that “[t]o allow DCS to use the final result from a chain of events it initiated to terminate the Father’s rights would effectively relieve them of any duty they owed to parents upon taking their children into state custody.”

It requires quite a stretch of logic, however, to conclude that the Department initiated the chain of events that led to the termination of Father’s parental rights. Despite any failings it may have shown, the Department surely cannot be held responsible for Father’s drug addiction, for his willingness to smoke crack cocaine around his newborn son, or for the prior convictions which increased the length of his sentence. DCS also cannot be held responsible for Father’s failure to contact the Department after he completed drug treatment, or his decision to commit a robbery, regardless of how desperate he claims to have been. Most importantly, there is no legal basis for holding DCS in any way responsible for Father’s criminal conduct. It was that conduct, and the conviction arising therefrom, that resulted in the ground for termination.

Finally, although the Department is required to make reasonable efforts to reunite parents with the children it has removed from their care, this court has stated that such efforts are not required when the termination of a parent’s right to the care and custody under eight years of age is based on the parent’s sentence of more than ten years. *In re C.M.M. & S.D.M.*, No. M2003-01122-COA-R3-PT, 2004 WL 438326 at \*7 fn. 20 (Tenn. Ct. App. March 9, 2004) (no Tenn. R. App. P. 11 application filed). *See also, State Dept. of Children’s Services v. M.R.N.*, No. M2006-01705-COA-R3-PT, 2007 WL 120038 at \*12 (Tenn. Ct. App. Jan. 17, 2007) (no Tenn. R. App. P. 11 application filed). Accordingly, we hold that the Department’s efforts or alleged deficiencies therein, provide no defense to the ground for termination that was clearly established.

## **V. BEST INTEREST**

Once a ground for termination has been proven by clear and convincing evidence, the trial court must then determine whether it is the best interest of the child for the parent’s rights to be terminated, again using the clear and convincing evidence standard. The legislature has set out a list of factors for the courts to follow in determining the child’s best interest. These factors are,

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;

(4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;

(5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

(6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i).

All the factors which relate to the safety and the physical environment of the parental home weigh heavily in favor of termination of Father's parental rights, since he has no home to offer to M.B., he will probably remain incarcerated for the foreseeable future, and his prospects for establishing such a home after he is released are uncertain at best. He claims, however that he "has made many positive adjustments in both conduct and condition that will serve him well upon his release from prison in the near future." He points to his successful completion of the drug rehabilitation program, and he asserts that he has been drug-free ever since. He has also presented evidence of good behavior while behind bars. It is not at all clear, however, that he has made the sort of lasting adjustment that would be necessary before he can be entrusted with the care of a minor child.

The proof shows that Father did not maintain regular visitation or other contact with M.B., even when it was possible to do so, that he did not pay child support, and that he did not manage to establish a meaningful relationship with the child. While Father's personal circumstances may have made it difficult for him to do very much to promote a relationship with his son, the proof indicates that he made almost no effort in that regard. After a single visit with M.B. in January of 2005, he cancelled all subsequent scheduled visits, and he made no attempt to reschedule them. He has also never sent a card, a letter or a gift to M.B. from prison.

M.B. has been thriving in the care of his foster mother since he was seven months old. Her family is the only family he has known. She has bonded with him, and he shows affection towards her. Because the child has significant health issues, the foster mother must frequently take M.B. to specialists, and she must follow the instructions of those specialists to help him overcome his developmental problems. The foster mother would like to adopt M.B., which would promote the stability which is so vital to the best interests of growing children. *Taylor v. Taylor*, 849 S.W.2d



319, 328 (Tenn. 1993); *Kesterson v. Varner*, 172 S.W.3d 556, 562 (Tenn. Ct. App. 2005). Adoption is not possible unless Father's parental rights are terminated.

Father makes several arguments based upon the theory that since he loves his child he should be given another chance to demonstrate to M.B. and to the court that he is a changed man. He states that he wants to rectify some of the mistakes he made in the past, that he wants to be there for M.B. and to watch him grow. While these desires are understandable and even commendable, once a ground for termination has been established, Father's wishes are not the basis for determining M.B.'s best interest. As this court has said,

. . . the question of best interest primarily involves the rights of the child. The question of the parent's rights is relevant during this phase of the court's inquiry only to the extent that it impacts the child's best interest. When the interests of the child and the parents diverge, the best interests of the child must prevail.

*In re M.H.*, No. M2005-00117-COA-R3-PT, 2005 WL 3273073 at \*10 (Tenn. Ct. App. Dec. 2, 2000) (no Tenn. R. App. P. 11 application filed) (citing *In re H.A.L.*, No. M2005-00045-COA-R3-PT, 2005 WL 954866, at \*9 (Tenn. Ct. App. April 25, 2005) (no Tenn. R. App. P. 11 application filed). In view of the entire record, we find the Department has proved by clear and convincing evidence that it is in M.B.'s best interest that Father's parental rights be terminated, and we affirm the trial court.

## VI.

The judgment of the trial court is affirmed. We remand this case to the Juvenile Court of Robertson County for any further proceedings necessary. Tax the costs on appeal to the appellant.

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PATRICIA J. COTTRELL, JUDGE